83-1089

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

NO._____

RACK AND BALL CLUB, INC.

Appellant

v.

THE KOREAN PRESBYTERIAN SOUTH CHURCH OF NEW YORK

Appellee

JURISDICTIONAL STATEMENT-STATE CIVIL CASE

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE TERM, 2ND AND 11TH JUDICIAL DISTRICTS

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QUESTIONS PRESENTED

Did the Appellate Term err in rejecting appellant's contention that § D17—6.0 of the Administrative Code of the City of New York is unconstitutional, in that it provides for notice by publication only, of *in rem* foreclosure proceedings, and does not require that personal notice of the proceeding be given to appellant, the tenant in sole and open occupancy of the premises under foreclosure?

Did the Appellate Term err in distinguishing the Supreme Court's decision in the case of *Mennonite Board of Missions v. Adams*, No. 82-11, upon its facts, in that the interest involved in that case was a matter of public record, while the interest of appellant, the tenant in sole and open occupancy of the entire premises, was not a matter of public record, in view of the Supreme Court's statement in *Mennonite Board*, that the "case is controlled by the analysis in *Mullane*", in which the property interest was that of beneficiaries of a trust fund, not a matter of public record?

Did the Appellate Term err in holding, in effect, that the statutory provision, stating that "the owners of property liable to assessment, or mortgage thereof or a person having a lien or claim thereon, may file with the director of finance, a notice stating his name and post office address", relieved the city of its constitutional obligation to provide personal notice of foreclosure, to the tenant in sole and open occupancy of the premises under foreclosure?

Did the Appellate Term err in holding that the City was relieved of its constitutional obligations by reason of the fact that the tenant had "notice of the proceeding in time to redeem the property or purchase it at the sale, if it so desired"?

NOTE: 28 U.S.C. §2403(b) may be applicable to this appeal. A copy of this jurisdictional statement shall be served upon the Attorney General of the State of New York.

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DESIGNATION OF CORPORATE RELATIONSHIPS

Rack and Ball Club, Inc., filing this Jurisdictional Statement-State Civil Case, as appellant in this proceeding states that:

This is its original Designation of Corporate Relationships.

Rack and Ball Club, Inc. is not owned by any parent organization.

Rack and Ball Club, Inc. does not have an ownership interest in any subsidiaries.

Rack and Ball Club, Inc. does not have any affiliates.

Dated: December 21, 1983

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RACK AND BALL CLUB, INC.

Appellant

v.

THE KOREAN PRESBYTERIAN
SOUTH CHURCH OF NEW YORK

Appellee

OPINIONS BELOW

The opinion of the Supreme Court of the State of New York, Appellate Term, 2nd and 11th Judicial Districts upon which judgment was entered on June 27, 1983, affirming the judgment of the Civil Court of Queens County dated November 5, 1982, and its opinion upon which its order was entered dated August 24, 1983, granting appellant's motion for reargument, and upon such reargument, adhering to its original decision, and denying leave to

appeal to the Appellate Division, are set out in the appendix hereto. The said decisions are not officially reported. The order of the Appellate Division, Second Department, denying leave to appeal to the said Appellate Division from the June 27, 1983 order of the Appellate Term was entered on September 22, 1983, without opinion.

JURISDICTION

i. This is a summary proceeding instituted in the Civil Court of the City of New York, Queens County to evict appellant, the tenant in sole occupancy under a lease, of premises purchased by appellee at auction from the City of New York, subject to existing tenancies, if any, which premises the City of New York acquired pursuant to judgment in an *in rem* foreclosure proceeding, in which the said tenant was not served nor made a party. The trial court judgment, affirmed by the Appellate Term, held that the tenant was divested of its interest in the premises by virtue of the judgment of foreclosure entered solely upon notice by publication, pursuant to Section D17-6.0 of the Administrative Code of the City of New York. The validity of the said section is drawn into question on the ground that notice by publication, as a basis for depriving a tenant in sole and open occupancy of the premises under *in rem* foreclosure, of its leasehold property interest, does not meet the minimum requirement of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, when the name and address of the tenant are reasonably ascertainable.

ii. The judgment appealed from was entered in the Supreme Court of the State of New York, Appellate Term, 2nd and 11th Judicial Districts, on June 27, 1983, affirming the judgment entered in the Civil Court, City of New York, County of Queens, on November 5, 1982, and rejecting appellant's claim that Section D17-6.0 of the Administrative Code of the City of New York is repugnant to the Fourteenth Amendment to the Constitution of the United States. On August 24, 1983, an order was entered in the said Appellate Term, granting appellant leave to reargue the aforesaid appeal, and upon such reargument adhering to the original decision, distinguishing the case on the facts, from the Supreme Court's decision in *Mennonite Board of Missions v.*

82-11*, and denying leave to appeal to the Appellate Division. On September 22, 1983, an order was entered in the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, denying appellant leave to appeal to the said court from the judgment entered in the Appellate Term on June 27, 1983. No further appeal to a higher court in the State of New York is available to appellant, thus the Appellate Term is the highest state appellate court in which a decision can be had. Notice of Appeal to the Supreme Court of the United States, from the judgment of June 27, 1983, and from the order of August 24, 1983 granting reargument and upon reargument adhering to the original decision, with proof of service thereof, was timely filed with the Clerk of the Appellate Term, 2nd and 11th Judicial Districts, on October 24, 1983 and with the Clerk of the Civil Court, Queens County, on October 24, 1983.

iii. The jurisdiction of the U.S. Supreme Court to review this decision of the Supreme Court of the State of New York, Appellate Term, 2nd and 11th Judicial Districts, on appeal, is conferred by 28 U.S.C. Section 1257(2). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on appeal in this case: *Hoffman* v. *Pursue Ltd.*, 420 U.S. 592, 605 (1975); *Manhattan Life Ins. Co.* v. *Cohen*, 234 U.S. 123,134 (1914); *Williams* v. *Bruffy*, 96 U.S. 176, 183 (1877); *Talley* v. *California*, 362 U.S. 60,62 (1960); *Tucker* v. *Texas*, 326 U.S. 517 (1945); *Minneapolis, St. P. & S.S.M.R. Co.* v. *Rock*, 279 U.S. 410 (1928).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides in Section 1 as follows:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall

*Since, 77 L. ed 2d 180 (1983)

> make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Section D-17.60 of the Administrative Code of the City of New York, effective on July 23, 1974, the date of the commencement of the City's *in rem* foreclosure proceeding, is set forth in full in the appendix hereto. In relevant part, the said section provides:

> "§D 17-6.0 Public notice of foreclosure *** the finance administrator shall cause a notice of foreclosure to be published at least once a week for six successive weeks in the City Record and in two newspapers designated by the finance administrator and published within the county***
>
> On or before the date of the first publication of the notice above set forth, the finance administrator shall cause a copy of such notice to be mailed (a) to each owner and mortgagee of the property affected thereby as shown by the records maintained pursuant to Section D17-7.0***"

Section D17-7.0 referred to above, provided, at the time, as follows:

> §D17-7.0 Notice to mortgagee or lienor. - Any owner of real property, any mortgagee thereof or any person

having a lien or claim thereon, or interest therein may file with the city treasurer a notice stating his name, residence and post office address and a description of the parcel in which such person has an interest, which notice shall continue in effect for the purposes of this section for a period of ten years, unless earlier cancelled by such person. The city treasurer shall mail to each such person forthwith after the completion and filing of the list of delinquent taxes as herein provided, a copy of each notice required under this title and affecting such parcel. The failure of the city treasurer to mail such notice as herein provided shall not affect the validity of any proceeding brought pursuant to this title. (As added by L. 1948, ch. 411, July 1.)"

Administrative Code of the City of New York Section D17-17.0 cited in the Appellate Term's opinion of June 27, 1983, provided on July 23, 1974, as follows:

"D17-17.0 Registering owner, mortgagee, et cetera. - The owner of property liable to assessment, or mortgagee thereof, or a person having a lien or claim thereon, may file with the director of finance a notice stating his name and postoffice address, a description of the premises by reference to section or ward, block and lot numbers on the tax map, which notice shall continue in effect for the purposes of this section for the period of ten years, unless earlier cancelled by such person.

> Service of notice or process shall be made upon such persons who have filed a notice in respect to such premises. Such service may be made personally or by mail to the address designated in said notice. The failure to receive such notice as herein provided shall not affect the validity of any action or proceeding brought pursuant to this title. (Added by L. 1948, ch. 411; amended by L. 1963, ch. 100, § 384.)"

Section D17-12.0 and D17-25.0 of the Administrative Code, cited by the Appellate Term in its opinion of June 27, 1983, are set forth in full in the Appendix hereto.

In relevant part, subdivision b of section D17-12.0, provides:

> "***Upon the execution of such deed, the city shall be seized of an estate in fee simple absolute in such land and all persons *** who may have had any right, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and

Section D17-25.0 provides, in pertinent part, as follows:

> "a. The city's interest in property acquired by *in rem* tax foreclosure may be released pursuant to this section on the application of any party who had an interest in said property as either owner, mortgagee, lienor or encumbrancer at the time of thecity's acquisition thereof ***"

STATEMENT OF THE CASE

On July 23, 1974, the City of New York, commenced *in rem* foreclosure, for non-payment of taxes by the owners thereof, of premises in Queens County of which appellant was the tenant in sole and open occupancy under a lease. Appellant was not made a party to the foreclosure and was not served therein. The only notice of the proceeding was by publication pursuant to Section D-17.60 of the Administrative Code. Judgment was entered in the proceeding and the City acquired Title to the premises on December 5, 1979, and appellant continued in sole and open occupancy of the premises, as its tenant. On December 9, 1981, respondent was the successful bidder at an auction sale of the premises. The terms of sale and the Deed which respondent received from the City on March 2, 1982, both provided that the sale was "subject to *** the rights, if any, of tenants and persons in possession, if any". Thereafter, respondent served a 30 day notice of termination of tenancy, and subsequently, instituted a holdover proceeding for eviction of the tenant. The Civil Court awarded judgment of possession to respondent. (A copy of the Civil Court decision containing a statement of the undisputed facts, stipulated by the parties, is included in the Appendix hereto at Pages 5a to 9a).

Upon appeal to the Appellate Term of the Supreme Court, appellant, in its brief, raised the issue that the provision of Section D17-6.0, for notice, by publication only, does not measure up to the quality of notice which the Fourteenth Amendment requires, to terminate the lease of a tenant in sole occupancy of the affected premises. In support thereof, appellant cited the decisions of the Supreme Court in the cases of *Mullane* v. *Central Hanover Bank & Trust Co.* 339 U.S. 306, 94L ed 865, 70 S Ct 652 (1949) and *Schroeder* v. *New York* 371 US 208, 9L ed 2d 255, 83 S Ct 279 (1962). Appellant argued that the Court below erred in its ruling, in effect, that the publication of notice, pursuant to Section D17-6.0, was sufficient notice to the tenant to support a judgment divesting the tenant of its rights under its lease. Appellant argued that such notice was inadequate, and violative of the tenant's right to due process under the Fourteenth Amendment.

The Appellate Term in its opinion of June 27, 1983, acknowledged appellant's argument, that Section D17-6.0 is unconstitutional, since it does not provide for personal notice to tenants in possession, and rejected the same, stating that, if tenant wanted such notice, it could have filed an *in rem* card, as provided in Section D17-17.0, (supra).

Appellant duly filed a timely motion for reargument of the said appeal, seeking, in the alternative, leave to Appeal to the Appellate Division, inviting the attention of the Court to the Decision of the Supreme Court of the United States, in the case of *Mennonite Board of Missions* v. *Richard Adams*, No. 82-11 (1983), decided on June 22, 1983. Appellant, in its motion papers, noted that it was the sole occupant of the foreclosed property, whose name and address were clearly displayed thereon, and thus easily ascertainable, without imposing any great burden on the City. Appellant further noted that Section D17-17.0, cited by the Appellate Term in its decision, and hereinabove quoted, neither authorized nor required the filing of an *in rem* card by a tenant in possession under a lease, and that even if it could do so, its "ability to take steps to safeguard its interests does not relieve the state of its constitutional obligations" (*Mennonite Board, supra*).

In its decision on August 24, 1983, the Appellate Term, granted that branch of Appellant's motion seeking leave to reargue and upon reargument, adhered to its original decision. The branch of the motion seeking leave to appeal to the Appellate Division was denied. In its opinion, the Appellate Term stated that the case, *Mennonite Board, supra*, is distinguishable on its facts, alleging that the property interest, in that case, was a matter of public record whereas, in the case at bar, the tenant's interest was not a matter of public record. In fact, the record in *Mennonite Board* did not contain the mortgagee's address, and the Supreme Court held that the state must exercise "reasonably diligent efforts" in determining the address, while, in the case at bar tenant was in sole and open occupancy of the premises, and its identity was "very easily ascertainable". The Appellate Term further stated that "while the tenant there had no notice of the proceeding until after the sale and after the redemption period, the instant tenant clearly had notice of

the proceeding in time to redeem the property or purchase at the sale if it so desired." The fact is, that the Supreme Court's decision in *Mennonite Board*, rested upon the inadequacy of the notice of the pending proceeding, and not of the right to redeem or to purchase at a sale after the city acquired title through *in rem* foreclosure. In addition, Section D17-25.0 of the Administrative Code, cited by the Appellate Term in its decision on June 27, 1983, and relied on by it in support of the above quoted portion of its August 24, 1983 decision, limits the right of redemption to the owner, mortgagee, lienor or encumbrancer, at the time of the city's acquisition of the property, and does not authorize redemption by a tenant in possession.

The Appellate Division on September 22, 1983, denied, without opinion, Appellant's timely motion for leave to appeal to it, from the aforesaid order of the Appellate Term, affirming the judgment below.

THE FEDERAL QUESTION IS SUBSTANTIAL

In the case of *Mennonite Board of Missions* v. *Adams*, No. 82-11 decided on June 22, 1983, the Supreme Court held that notice by publication and posting does not provide a mortgagee of real property with notice of a proceeding to sell the mortgaged property for nonpayment of taxes, sufficient to satisfy the requirements of the Due Process Clause of the Fourteenth Amendment.

This appeal raises the question whether the notice by publication authorized by Section D 17-6.0 of the Administrative code of The City of New York, provides a tenant, in sole and open occupancy of real property, with notice of an *in rem* foreclosure proceeding, sufficient, under the Due Process Clause of the Fourteenth Amendment, to divest the tenant of its leasehold interest in the property.

In *Mennonite Board*, the Supreme Court held, in effect, that the state was required to use "reasonably diligent efforts" to ascertain the address of a mortgagee whose name only was recorded. In the case at bar the name and address of the tenant in sole and open

occupancy of the property under foreclosure were so "very easily ascertainable" as to satisfy the requirements of the dissenting opinion in *Mennonite Board*. Manifestly, constructive notice alone to such a tenant does not satisfy the mandate of *Mullane*, and does not meet the requirements of the Due Process Clause of the Fourteenth Amendment.

In New York, the general rule is that actual possession of real estate is notice to all the world of the existence of any right which the person in possession is able to establish. [*Phelan* v. *Brady*, 119 N.Y. 587,592 (1890); *Ehrlich* v. *Hollingshead*, 275 App Div. 742 (1949); *Wardell* v. *Older*, 70 AD 2d 1008, 1009)(1979)]

In *Phelan* v. *Brady*, *supra*, plaintiff's counsel argued, as does the Appellate Term in its June 27, 1983 opinion, that where premises are occupied by numerous tenants it might be inconvenient and difficult to ascertain the interests that are claimed by any or all of them. The Court of Appeals held: "This circumstance cannot change the rule". Enforcement of the rule of *Mennonite Board*, would not require The City of New York to ascertain the interest of all tenants in possession, but merely to give notice by mail to each of them, of its *in rem* foreclosure proceeding. In the case at bar, of course, there was no such problem, since Appellant was the sole tenant, in actual possession of the entire premises under foreclosure, and direct notice to it was capable of accomplishment, with no difficulty and very little effort.

The law is also well established in New York, that the interest which an occupant has, in premises under foreclosure, is not affected by the judgment of foreclosure, if he is not made a party to the action. [*Davidson* v. *Weed*, 21 App. Div. 579, 581 (1897); *Harvey* v. *Mooney*, 168 AD 169, 170 (1915); *Douglas* v. *Kohart*, 196 AD 84, 88 (1921); *Genuth* v. *Realty Corp*. 88 Misc 2d 586, 587 (1976); *Howard* v. *Kerr*, 82 Misc 2d 1039 (1975)]

The City of New York gives tacit recognition to the fact that the rights of tenants in possession are unaffected by the judgment in its *in rem* foreclosure proceedings, by making its Terms of Sale, and its deed to the purchaser at auction, "subject to *** the rights, if any, of tenants and persons in possession if any".

It is commonly recognized that New York State legislation often provides the model for similar legislation in other states. In the light thereof application by The Supreme Court of the rule of *Mennonite Board* and *Mullane* to the notice provisions of § D17-6.0 of the Administrative Code of The City of New York, is needed to assure that tenants in possession of property under *in rem* foreclosure, throughout the United States, may not be deprived of substantial leasehold rights, upon constructive notice only, in violation of the Due Process Clause of the Fourteenth Amendment.

CONCLUSION

The decision below upholding the provisions of the Administrative Code of The City of New York for notice by publication only, to tenants in possession of real property under *in rem* foreclosure should be reversed and the cause remanded to the Appellate Term for an order recognizing the lease of the Appellant, notwithstanding the judgment in the *in rem* foreclosure proceeding. Alternately, this appeal should be accorded plenary review.

Respectfully submitted,
/s/Israel G. Seeger

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APPENDIX

OPINION AT APPELLATE TERM—JUNE 27, 1983

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM : 2nd and 11th
JUDICIAL DISTRICTS

PRESENT: PINO, P.J., BUSCHMANN
and HIRSCH, JJ.

THE KOREAN PRESBYTERIAN
SOUTH CHURCH OF NEW YORK,

Landlord-Respondent, NO. 113-Q

- against - DECIDED

RACK AND BALL CLUB, INC. June 27, 1983

Tenant-Appellant.

Appeal by tenant from final judgment of possession in favor of landlord.

Final judgment affirmed without costs.

In this commercial holdover proceeding, tenant contends that because it was not given personal notice of an *in rem* foreclosure proceeding by the City against the premises, its 15-year lease was unaffected by the judgment of foreclosure and by the City's subsequent auction sale of the premises to the present landlord. The court below rejected tenant's contention, and declined to adopt the ruling in *Howard* v. *Kerr* (82 Misc 2d 1039) that a tenant's lease survives an *in rem* foreclosure judgment where the tenant does not receive personal notice of the proceeding. Tenant challenges the lower court's holding on appeal and argues in addition that the

City's *in rem* foreclosure provisions (Administrative Code of City of New York, § D17-1.0 *et seq.*) are unconstitutional insofar as they do not require that personal notice of the proceeding be given to tenants in possession.

We entirely agree with the court below that tenant was bound by the judgment in the *in rem* foreclosure proceeding. The applicable statute (Administrative Code, § D17-12.0, subd b) provides that as a result of the foreclosure proceeding the City becomes seized of an estate in fee simple absolute in the land and all persons "who may have had any right, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption....." Thus, tenant's leasehold interest in the property was divested by the foreclosure judgment (see *W.S. 23 Realty Corp.* v. *City of New York* (106 Misc 2d 271).

We also reject tenant's contention that the statute's notice provisions (Administrative Code, § D17-6.0) are insufficient because they do not provide for personal notice to tenants. If tenant wanted such notice it could have filed an *in rem* card as provided for in the statute (Administrative Code, § D17-17.0). To hold otherwise would have the impracticable result of requiring the City to make inquiry as to the exact nature of each interest in each parcel subjected to *in rem* foreclosure. As one court has stated, "this would be an unwarranted burden on the City and would create chaos with *in rem* statutes" (*W.S. 23 Realty Corp.* v. *City of New York* (106 Misc 2d 271, 273). Finally, it should be noted that tenant, had it so chosen, could have applied for release of the property for up to two years after the deed by which the City acquired title to the property was recorded (Administrative Code, § D17-25.0). While tenant admittedly had ample notice that the City had acquired title to the premises, it did not apply for the property's release. In view of all the foregoing, it is our opinion that the judgment against tenant must be affirmed.

We have examined tenant's other contentions and find them to be without merit.

All concur.

OPINION ON MOTION FOR REARGUMENT OR LEAVE TO APPEAL
AUG. 24, 1983

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE TERM: 2nd and 11th
JUDICIAL DISTRICTS

PRESENT: PINO, P.J., BUSCHMANN
and HIRSCH, JJ.

THE KOREAN PRESBYTERIAN
SOUTH CHURCH OF NEW YORK,

Landlord-Respondent,

- against - No. 113-Q

RACK AND BALL CLUB, INC., DECIDED

Tenant-Appellant. Aug. 24, 1983

DECISION

That branch of the motion seeking leave to reargue granted and upon reargument original decision adhered to.

That branch of the motion seeking leave to appeal to the Appellate Division denied.

It is our opinion that the Supreme Court decision relied upon by tenant is distinguishable upon its facts. While the property interest involved in that case was a matter of public record, the instant tenant's interest was not a matter of public record nor did tenant here avail itself of the opportunity afforded by the statue to assure itself of notice by filing an *in rem* card. Moreover, while the tenant there had no notice of the proceeding until after the sale and after

the redemption period, the instant tenant clearly had notice of the proceeding in time to redeem the property or purchase it at the sale, if it so desired. Accordingly, we adhere to our original decison.

Opinion Of The Trial Court—November 5, 1982

Civil Court Of The City Of New York
County Of Queens

The Korean Presbyterian South Church Of New York,

Petitioner(Landlord),

- against -

Rack And Ball Club, Inc.,

Respondent(Tenant).

DECISION
Index No.
L&T 23387/82
Filed-Queens
County
Nov. 5, 1982
Civil Court
Housing Part

HON. WILLIAM D. FRIEDMANN, Judge

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This summary proceeding seeks to remove respondent as a hold-over tenant.

THE ISSUE

It places in focus whether a tenant not made a party to an *in rem* foreclosure proceeding has the right to remain in possession until the end of its lease term. In other words, what effect, if any, does an *in rem* proceeding have upon the tenants right to possession. Does the tenant have the right as it contends here to remain under an extended lease with a former owner, expiring on March 30, 1991, or is tenant, as the new landlord contends, merely month to month subject to landlords right to immediate possession.

Upon the recommendation of the Court, and stipulation of counsel, all jurisdictional aspects were conceded, and it was agreed that conflicting contentions would be considered as if both parties had moved for summary judgment. The court was to rely upon the pleadings, undisputed facts, documents marked in evidence, and upon an exchange of legal memoranda.

UNDISPUTED RELEVANT FACTS

The undisputed facts relevant to the court's consideration of this disputed issue are chronologically:

(1) Tenants possession under a lease with a former owner commenced on March 1, 1965; (2) The City of New York on July 23, 1974 commenced an *in rem* foreclosure proceeding in compliance with all statutory requirements; (3) Tenant was never served or made a party to the *in rem* proceeding; (4) Tenant's lease was extended by a former owner on January 6, 1976 to commence April 1, 1976 and terminate on March 3, 1991. The lease was subsequently recorded, on July 10, 1979; (5) title vested in the City of New York on December 5, 1979, as the result of the *in rem* proceeding; (6) Thereafter, tenant remained in possession under an oral arrangement with the City. It contended its possession continued under the terms of its prior existing lease; (7) The Board of Estimate of the City of New York by resolution of September 24, 1981 authorized that the subject property be sold at public auction. (Section 384 of the New York City Charter); (8) The terms and conditions of this separate land sale by the City indicated that it was "subject to *** the rights, if any, of tenants and persons in possession, if any." (9) Landlord was the successful bidder at the auction sale on December 9, 1981. The deed it received from the City on March 2, 1982 was "subject to *** the rights, if any, of tenants and persons in possession, if any."; (10) Landlord thereafter served its 30 day notice and commenced this hold-over proceeding (Section 711-RPAPL).

THE LAW

The property in question was the subject of a real estate tax lien against which *in rem* foreclosure proceedings were commenced July 23, 1974, and concluded in judgment on December 5, 1979.

The tenant, who was in possession under a lease existing at the time of the *in rem* proceeding commencement, was never brought into the proceeding.

Tenant now claims that its tenancy was unaffected by the foreclosure proceeding since it was not made a party thereto. It places substantial, if not exclusive, reliance on *Howard v. Kerr,* (82 Misc 2d 1039). Unquestionably, the court there found that a tenant not made a party to an *in rem* foreclosure proceeding had a right to remain in possession until the end of a lease term.

The Administrative Code provides an alternative enforcement remedy to the City of New York (Administrative Code, Section D17-2.0 (a,b). This alternative remedy is *in rem* foreclosure utilized herein. It is intended to be a summary proceeding (Administrative Code Section D17-4.0) which results in a judgment directing the actual transfer of title to the City of New York in satisfaction of the tax debt (Administrative code, Section D17-12.0(b)). The *in rem* proceeding is one against the land and divests the owner and all others of any interest in the land (*See, City of New Rochelle v. Stevens,* 271 App Div 977). Since it is *in rem* and not in personam, it does not provide for personal service on the owner, mortgagee or other person with interest, but rather provides for notice by publication and ordinary mail (Administrative Code, Section D17-6.0, D17-6.0(c)).

Such alternative enforcement proceedings available to taxing authorities are not peculiar to the City of New York. (*Compare* Real Property Tax law, Art 11, Title 2 *with* Real Property Tax Law, Art-ll, Title 3.)

CONCLUSION

This court finds the proceeding was unquestionably *in rem* foreclosure and that all appropriate acts were taken resulting in title vesting in the City of New York. The City's title was properly conveyed to landlord at a separate public land sale auction closing. Thus the *in rem* judgment vesting title in the City and relied upon by the landlord herein divested the tenant of any interest in the property.

No consideration therefore, need be given to tenants subsequent tenancy. Landlords contention that tenant is no more than month-to-month is correct.

Tenant's lease entered into with the former owner provides no greater right. An *in rem* foreclosure proceeding is commenced by the filing of a delinquent tax list. Such filing with the County Clerk is the equivalent of a notice of pendency and has the same effect [Administrative Code, Section D17-5.0(c)]. Therefore, the delinquent tax list, like a notice of pendency, is constructive notice to all who take a subsequent interest in the realty of the pendency of the action. A person whose interest is acquired after such filing is bound by all proceedings in the action as if he were a party (CPLR 6501). Tenant's lease, executed on January 6, 1976, was subject to that notice and tenant is subject to all proceedings in the *in rem* foreclosure as if it were a party. However, this court believes that the determination in *Howard v. Kerr* is predicated on a fundamental error law. The court holding that an *in rem* tax foreclosure proceeding is analogous to a mortgage foreclosure proceeding requiring the application of procedures which govern in such cases. The *Howard v. Kerr* conclusion rested on *Weiss v. Stone* (129 NYS 2d 525) and *Edbro Realty Co. v. Clarey*, (141 Misc 779, affd 235 App Div 714). While those cases unquestionably hold that mortgage foreclosure procedures are applicable, they are not *in rem* proceedings. In both of these cases, the courts clearly state that they are proceedings brought to foreclose tax liens under different provisions of the applicable local statutes. This is particularly apparent from the fact that the plaintiff, in both instances, is not the taxing authority but rather an individual who purchased the tax lien.

The Administrative Code of the City of New York permits enforcement of tax liens by an action in the nature of a mortgage foreclosure. (Administrative Code section 415(1)-35.0). This procedure may be used either by the City or by the purchaser of lien under a transfer of tax lien (Administrative Code, Section, 415(1)-31.0, 415(1)-33.0). Regardless of who the plaintiff is under this procedure the purpose of the action is to obtain a judgment directing the sale of the realty to satisfy the lien (Administrative

Code, Section 415(1)-42.0). It is this procedure which was used in *Weiss* and *Edbro*.

Under the circumstances tenant may not claim any rights under its existing lease. Accordingly, judgment of possession is granted. The question of use and occupancy or any stay of preceedings is reseved for a future hearing to be scheduled upon three days notice.

Dated: November 5, 1982

J.C.C.

Nov. 5, 1982—Judgment entered in accordance with the above.

JUDGMENT OF APPELLATE TERM

APPEALED FROM - JUNE 27, 1983

Cal. # 113 Q
March Term 1983

At a term of the Appellate Term of the Supreme Court of the State of New York for the 2nd and 11th Judicial Districts, held in Kings County on the 27th day of June, 1983.

Present-Hon Frank J. Pino Presiding Justice
Albert H. Buschmann
Arthur S. Hirsch Justices

THE KOREAN PRESBYTERIAN
SOUTH CHURCH OF NEW YORK,

Landlord-Respondent,

v.

RACK AND BALL CLUB, INC.

Tenant-Appellant.

The above named appellant, having appealed to this court from a judgment of the Civil Court, City of New York; Queens County entered on November 5, 1982 and said appeal having been submitted by Israel G. Seeger Counsel for the appellant, and no one appearing for respondent and due deliberation having been had thereon:

It is hereby ordered and adjudged that the final judgment is affirmed without costs. All concur.

John A. Cahill
Chief Clerk
Appellate Term

ORDER ON MOTION FOR REARGUMENT OR LEAVE TO APPEAL—AUGUST 24, 1983

REARG/LV TO APP
AT-7 (2/80)

At a term of the Appellate Term of The Supreme Court of the State of New York for the 2nd and 11th Judicial Districts, held in Kings County, on the day of , 1983.

CAL. # 113 Q AUGUST 24, 1983
MARCH 1983 TERM

Present- Hon. FRANK J. PINO Presiding Justice

ALBERT H. BUSCHMANN

ARTHUR S. HIRSCH Justices

THE KOREAN PRESBYTERIAN SOUTH CHURCH OF NEW YORK,

Landlord-Respondent,

- against -

Index No. L&T 23387/82

RACK AND BALL CLUB, INC.,

Tenant-Appellant.

The above named appellant having moved this court by order to show cause returnable July 14, 1983 for reargument of the appeal herein or for leave to appeal to the Appellate Division and said motion having duly come on to be heard;

Now on reading and filing the affidavit of Israel G. Seeger in support of said motion and the affirmation of Gust G. Orphanides in opposition thereto and all the papers upon which the appeal was heard; it is

ORDERED that branch of the motion seeking leave to reargue is granted and upon reargument original decision is adhered to; and it is further

ORDERED that branch of the motion seeking leave to appeal to the Appellate Division is denied.

ARTHUR S. HIRSCH
Associate Justice
Appellate Term
Supreme Court, State of New York
Presiding Justice, Appellate Term

ORDER OF APPELLATE DIVISION ON MOTION FOR LEAVE TO APPEAL SEPTEMBER 22, 1983

Lv. App. from App. Term

No. 7012

At a Term of the Appellate Division of The Supreme Court of the State of New York, Second Judicial Department, held in Kings County on Sept. 22, 1983

HON. VINCENT D. DAMIANI, Justice Presiding
HON. GUY J. MANGANO)
HON. FRANK A. GULOTTA) Associate Justices
HON. LAWRENCE J. BRACKEN)

THE KOREAN PRESBYTERIAN SOUTH CHURCH OF NEW YORK

Landlord,

v.

RACK AND BALL CLUB, INC.,

Tenant.

Decision and Order on Motion for Leave to Appeal to the Appellate Division

---

In the above-entitled cause, the above-named tenant, having moved in this court for leave to appeal thereto from an order of the Appellate Term of the Supreme Court, 2nd and 11th Judicial Districts, dated June 27, 1983.

Now, upon the papers filed in support of the motion and papers filed in opposition or in relation thereto; upon all the proceedings heretofore had herein; and the motion having been

duly submitted and due deliberation having been had thereon, it is

ORDERED that the motion is hereby denied.

Enter:

IRVING N. SELKIN
Clerk of the Appellate Division
DATE: 9/22/83 NO. 7012

NOTICE OF APPEAL FILED OCTOBER 24, 1983, IN APPELLATE TERM, 2nd and 11th JUDICIAL DISTRICTS, AND IN CIVIL COURT, QUEENS COUNTY

IN THE SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE TERM: 2nd and 11th JUDICIAL DISTRICTS

RACK AND BALL CLUB, INC.,

Tenant-Appellant,

THE KOREAN PRESBYTERIAN SOUTH CHURCH OF NEW YORK,

Landlord-Appellee.

Index No.
L&T 23387/82
113/Q

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Notice is hereby given that Rack and Ball Club, Inc., the appellant above named, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of New York, Appellate Term, 2nd and 11th Judicial Districts, entered June 27, 1983, affirming the judgment of the Civil Court of the City of New York, Queens County, entered in this proceeding on November 5, 1982, and from the order of the said Appellate Term, entered on August 24, 1983, granting leave to reargue and upon said reargument adhering to its original decision.

This appeal is taken pursuant to 28 U.S.C. §1257(2).

Dated: New York, New York
October 21, 1983

MILLER & SEEGER
Attorneys for Appellant
60 East 42nd Street
New York, N.Y. 10165
(212) 867-6162

To: *Clerk of Appellate Term*
2nd and 11th Judicial Districts

Clerk of Civil Court, Queens County

Gust G. Orphanides
Attorney for Appellee
159-09 Hillside Avenue
Jamaica, New York 11432
(212) AX 1-8181

§ D17-6.0 Administrative Code of the City of New York

§ D17-6.0 Public notice of foreclosure

Upon the filing of such list in the office of the county clerk, the finance administrator forthwith shall cause a notice of foreclosure to be published at least once a week for six successive weeks in the City Record and in two newspapers designated by the finance administrator and published within the county in which the property affected by such list is located, except that in the county of Richmond one of the newspapers designated may be published in the county of New York or in the county of Kings. In New York and Bronx counties the newspapers to be designated for the publication of such notice or any other public notice required pursuant to this article shall be the daily law journal designated by the justices of the appellate division of the first judicial department and another newspaper designated by said justices pursuant to the provisions of section ninety-one of the judiciary law. Such notice shall be in substantially the following form:

Supreme Court, ...County.

NOTICE OF FORECLOSURE OF TAX LIENS BY THE CITY OF NEW YORK IN THE BOROUGH OF.....(here insert name of Borough, and section or ward number and general description giving boundaries of section or ward, or perimeter boundaries of contiguous sections or wards. Such description need not contain measurements or directions.)

BY ACTION IN REM

Please take notice that on the.....day of.....the Finance Administrator of the City of New York, pursuant to law, filed with the Clerk of.....County, a list of parcels of property affected by unpaid tax liens, held and owned by said City of New York which on the.....day of..... had been unpaid for a period of at least three years or in the case of abandoned properties one year, or in the case of properties improved with one or two family dwellings as the same shall appear from the assessment records in the office of the finance administrator, four years after the date when the tax, assessment or other legal

charge became a lien. Said list contains as to each such parcel, (a) a brief description of the property affected by such tax lien, (b) the name of the last known owner of such property as the same appears on the annual record of assessed valuation for the last fiscal year or a statement that the owner is unknown if such be the case, (c) a statement of the amount of such tax lien upon such parcel, including those which shall have been due and unpaid for less than three years, or in the case of abandoned properties one year, or in the case of properties improved with one or two family dwellings as the same shall appear from the aforesaid assessment records, four years together with the date or dates from which, and the rate or rates at which interest and penalties thereon shall be computed.

All persons having or claiming to have an interest in the real property described in such list of delinquent taxes are hereby notified that the filing of such list of delinquent taxes constitutes the commencement by the city of New York of an action in the Supreme Court, ...County to foreclose the tax liens therein described by a foreclosure proceeding in rem and that such list constitutes a notice of pendency of action and a complaint by the City of New York against each piece or parcel of land therein described to enforce the payment of such tax liens. Such action is brought against the real property only and is to foreclose the tax liens described in such list.

No personal judgment shall be entered herein for such taxes, assessments or other legal charges or any part thereof.

This notice is directed to all persons having or claiming to have an interest in the real property described in such list of delinquent taxes and such persons are hereby notified further that a certified copy of such list of delinquent taxes has been filed in the main office of the finance administrator in the Borough of Manhattan and in the office of the finance administrator at....., in the Borough of....., and will remain open for public inspection up to and including the.....day of.....(here insert a date at least seven weeks from the date of the first publication of this notice,) which date is hereby fixed as the last date for redemption.

And take further notice that any person having or claiming to have an interest in any such parcel and the legal right thereto may on or before said date redeem the same by paying to the finance administrator the amount of all such unpaid tax liens thereon and in addition thereto all interest and penalties which are a lien against such real property computed to and including the date of redemption. In the event that such taxes are paid by a person other than the record owner of such property, the person so paying shall be entitled to have the tax liens affected thereby satisfied of record or to receive an assignment of such tax liens evidenced by a proper written instrument.

Every person having any right, title or interest in or lien upon any parcel described in such list of delinquent taxes may serve a duly verified answer upon the corporation counsel setting forth in detail the nature and amount of his interest or lien and any defense or objection to the foreclosure. Such answer must be filed in the office of the county clerk in the county in which such real property is located and served upon the corporation counsel at any time after the first date of publication but not later than twenty days after the date above mentioned as the last day for redemption. In the event of failure to redeem or answer by any person having the right to redeem or answer, such person shall be forever barred and foreclosed of all his right, title and interest and equity of redemption in and to the parcel described in such list of delinquent taxes and a judgment in foreclosure may be taken by default.

_____

Finance Administrator

_____

Corporation Counsel
Office and Post Office Address

_____

Borough of Manhattan
City of New York

On or before the date of the first publication of the notice above set forth, the finance administrator shall cause a copy of such notice to mailed (a) to each owner and mortgagee of the property affected thereby as shown by the records maintained pursuant to section D17-7.0 in the office of the finance administrator at the last known address as shown by said records and (b) if on the latest completed assessment roll the name or address of any person listed as the owner of property affected is different from that shown on said records in the office of the finance administrator, then to the person listed as the owner on such assessment roll at the address as shown on the assessment roll, provided that the failure of the finance administrator to mail such notice shall not affect the validity of any proceeding brought pursuant to this title as to any parcel other than the parcel with respect to which notice was not mailed as herein provided, and in the event that the name or address of such owner or mortgagee does not appear in such records the finance administrator shall so state in an affidavit which shall be filed in the office of the county clerk and the finance administrator shall cause a copy of such notice to be posted in the office of the finance administrator, in the county in which the property subject to such tax lien is situated and three other conspicuous places in the borough in which the affectecd properties are located. The finance administrator shall cause to be inserted with or attached to such notice a statement substantially as follows: "To the party to whom the enclosed notice is addressed: You are the presumptive owner or lienor of one or more of the parcels mentioned and described in the list referred to in the enclosed notice.

Unless the taxes and assessments and all the other legal charges are paid, or an answer interposed, as provided by statute, the ownership of said property will in due course pass to the City of New York as provided by the Administrative Code of the City of New York.

Dated.....

_____

Finance Administrator"

(added by L. 1948, ch. 411; amended by L. 1959, ch. 396; L. 1963, ch. 100 § 379; L. 1969, ch. 733, May 22; L. 1970, ch. 746, May 12, eff. July 1, 1971.)

§D17-12.0 Administrative Code of the City of New York

§D17-12.0 Final judgment. -a. The court shall determine upon proof and shall make finding upon such proof whether there has been due compliance by the city with the provisions of this title.

b. The court shall make a final judgment awarding to the city the possession of any parcel described in the list of delinquent taxes not redeemed or withdrawn as provided in this title and as to which no answer is interposed as provided herein. In addition thereto such judgment shall contain a direction to the finance administrator to prepare, execute and cause to be recorded a deed conveying to the city full and complete title to such lands subject only to tax liens accrued or accruing subsequent to those contained in the list of delinquent taxes. Upon the execution of such deed, the city shall be seized of an estate in fee simple absolute in such land and all persons, including the state of New York, infants, incompetents, absentees and non-residents who may have had any right, title, interest, claim, lien or equity of redemption in or upon such lands shall be barred and forever foreclosed of all such right, title, interest, claim, lien or equity of redemption, except as otherwise provided in section D17-25.0 of this title. The appointment and tenure of receivers, trustees or any other persons, including administrators under article seven-a of the real property actions and proceedings law, appointed by an order of a court to manage real property, shall terminate when title to such property vests in the city pursuant to the provisions of this title. After such termination, said receivers, trustees or administrators shall be accountable to the courts that appointed them for the faithful performance of their fiduciary obligations during the term of their appointment and to the city for any rents and income received by them for any period subsequent to the date of the vesting of title in the city.

c. Every deed given pursuant to the provisions of this section shall be presumptive evidence that the action and all proceedings

therein and all proceedings prior thereto from and including the assessment of the lands affected and all notices required by law were regular and in accordance with all provisions of law relating thereto. After two years from the date of the recording of such deed, the presumption shall be conclusive, unless at the time that this subdivision takes effect the two year period since the recording of the deed has expired or less than six months of such period of two years remains unexpired, in which case the presumption shall become conclusive six months after this subdivision takes effect. No action to set aside such deed may be maintained unless the action is commenced and a notice of pendency of the action is filed in the office of the proper county clerk prior to the time that the presumption becomes conclusive as aforesaid. (Added by L. 1948, ch. 411, July 1; amended by L.L. 1955, No. 63, June 3; L. 1975, ch. 823, August 9, eff. January 1, 1976; L. 1976, ch. 816, July 26.)

§D17-25.0 Administrative Code of the City of New York

§D17-25.0 Application to the city for release of property by *in rem* tax foreclosure. -a. The city's interest in property acquired by *in rem* tax foreclosure may be released pursuant to this section on the application of any party who had an interest in said property as either owner, mortgagee, lienor or encumbrancer at the time of the city's acquisition thereof where such application is made at any time up to two years from the date on which the deed by which the city acquired title to said property was recorded or within two months of the effective date hereof with respect to property to which the city's deed was recorded no more than three years prior to the effective date hereof.

b. Any such application shall be made in writing to the commissioner of real estate and shall be verified. It shall contain the name and address of the applicant and shall state the date on which and the *in rem* action by which the city acquired title to the property sought to be released. It shall also contain a statement specifying the nature of the applicant's interest in the property and a full

description of the instrument from which the applicant's interest derives including the date of execution, the date and place of the recording or entry of said instrument and the parties thereto. In the event the applicant's interest arises by reason of the death of a prior owner, mortgagee, lienor or encumbrancer, then the application shall also state the applicant's relationship to said decedent and shall include whatever additional information may be necessary to prove the applicant's right to make such application. The sum of one hundred dollars to cover all fees and costs of the release shall be paid on the submission of such application.

c. Each application shall be supported by the certified search of the city register or by an official letter, certificate or certified search of any title insurance or abstract company, organized and doing business under the laws of this state. Such supporting instruments shall recite the recording data both as to the deed by which the city acquired title to the parcel sought to be released and the instrument from which the applicant's interest derives. In the event the applicant's interest does not appear of record but is derived by the death of an owner, mortgagee, lienor or encumbrancer of record, then the application shall also be supported by the affidavit of the applicant or other person having information thereof, or by the duly written certificate or certification of the county clerk or the clerk of any surrogate's or other court of record, or by any other instrument or document required by the corporation counsel to substantiate the applicant's right to file such application in compliance with the provisions of this section.

d. The city's interest shall be released only after payment, as to each parcel to be released, of the following sums of money:

1. The principal amount due on all unpaid taxes, assessments, water charges and sewer rents appearing on the list of delinquent taxes and accruing thereafter together with interest at the rate or rates provided by law.

2. Five percent of the amount paid pursuant to the preceding paragraph but not exceeding five hundred dollars for each parcel.

3. Any deficiency which may result to the city after all payments made by it for the repair, maintenance, and operation of the lands, real estate or real property shall have been charged or debited in the appropriate accounts of the city and all rents, license fees and other moneys collected by the city as a result of its operation of the said lands, real estate or real property shall have been credited in such accounts. Any contract for repair, maintenance, management or operation made by the city on which it shall be liable, although payment thereon shall not have been made, shall be deemed a charge or debit to such accounts as though payment had been made. The amounts paid and collected by the city as shown in its accounts and the necessity for making the several payments and contracts to be charged as herein provided shall be conclusive upon the applicant. Where a deficiency under this subsection shall be created or increased by the failure of the city to collect rents, license fees or other moneys to which the city may have been entitled, the right to collect or to bring action for the same shall be assigned, transferred and set over to applicant by an instrument in writing.

4. Any and all costs and disbursements which shall have been awarded to the city or to which it may have become entitled by operation of law or which it may have paid or become liable for payment in connection with any litigation between it and the applicant or any person having an estate or interest in the lands, real estate or real property to be released resulting directly or indirectly from the foreclosure by action *in rem* of the delinquent taxes affecting said lands, real estate or real property.

e. The corporation counsel shall effect the release of the city's interest in property acquired by *in rem* tax foreclosure, as provided for in this section, by preparing and causing to be entered an order discontinuing the *in rem* tax foreclosure action as to said property, cancelling the noticle of pendency of such action as to said property and vacating and setting aside the *in rem* judgment of foreclosure and the deed executed and recorded pursuant to such judgment of foreclosure as to said property. The entry of such order shall restore all parties, including owners, mortgagees and any and all lienors and encumbrances, to the status they held at the time the city acquired title to said property, as if the *in rem* tax foreclosure

had never taken place, and shall render said property liable for all taxes and deficiencies which shall accrue subsequent to the taxes and deficiencies paid in order to obtain the release provided for in this section, or which were, for whatever reason, omitted from the payment made to obtain said release.

f. If an application pursuant to this section is filed within four months after the date of the city's acquisition of the subject property, said application shall be granted providing the corporation counsel approves the application as to form, timeliness and eligiblity of the applicant and providing the applicant has paid all amounts required to be paid by subsection d of this section within sixty days of the date on which a letter requesting applicant to make such payment is mailed or delivered to the applicant. The city shall not sell or asssign any property acquired by *in rem* tax foreclosure within four months of said acquisition but this provision shall not prevent the city from authorizing condemnation of such property or vesting title thereto in a condemnation proceeding during said four month period. In the event an application pursuant to this section is filed within four months of the city's acquisition by *in rem* tax foreclosure and title to the subject property vests in condemnation before the city's interest therein has been released by the vacate order provided for herein, the applicant shall be entitled to the condemnation award for such property without the entry of such vacate order, provided the corporation counsel has approved the application as aforesaid and providing that the amounts specified in subsection d of this section, if not previously paid, are deducted from said condemnation award, with taxes apportioned to the date of the condemnation title vesting.

g. If an application for a release of the city's interest in property acquired by *in rem* tax foreclosure has been filed within the time allowed in subsection a of this section, but more than four months after the date of the city's acquisition, the board of estimate may, in its discretion, authorize the release of the city's interest in said property, pursuant to this section, providing the application has been approved by the corporation counsel as to form, timeliness and eligibility of the applicant and providing the city has not sold or otherwise disposed of said property and providing further that said property has not been condemned or assigned to any

agency of the city and is not the subject of contemplated use for any capital or urban renewal project of the city. The corporation counsel shall effect such discretionary release only where the applicant after the board's authorization of the release, has paid all the amounts required to be paid by subsection d of this section within sixty days of the date on which a letter requesting applicant to make such payment is mailed or delivered to the applicant.

h. An owner of property entitled to an exemption under any of the provisions of article four of the real property tax law during all or part of the period covered by the tax items appearing on a list of delinquent taxes may apply for a release of the city's interest in such exempt property under the provisions of this section during the periods of time set forth herein and for an additional period up to ten years from the date of the city's acquisition of said property by *in rem* foreclosure. The application of such owner shall contain, in addition to the statements, searches and proofs required by this section, a statement that an exemption under the real property tax law is being claimed. Such application shall also state either that it is accompanied by the written certificate of the comptroller setting forth the precise period during which said property, while owned by such applicant, and during the period after the city's acquisition up to the date of the certificate if said property was still being used for an exempt purpose after said acquisition, was entitled to an exemption and the exact nature and extent of such exemption or that an application for such written certificate has been filed with the comptroller. On issuing such written certificate, the comptroller shall cancel those tax items which have accrued during the period covered by the certificate to the extent the applicant is entitled to an exemption as set forth in the certificate. Where an application by an exempt owner is filed more than four months after the date of the city's acquisition of the subject property, a release of the city's interest may be issued only at the discretion of the board of estimate and subject to all the restrictions set forth in the preceding subsection. A release to an exempt applicant shall be effected only after said applicant has paid all the amounts required to be paid by subsection d of this section, except for those tax items which have been cancelled, in whole or in part, pursuant to the comptroller's certificate within sixty days of the date on which a letter requesting payment is mailed or delivered to the applicant. (Added by L. 1972, ch. 932, June 8, which repealed former section; amended by L. 1975, ch. 292, June 24.)

Office - Supreme Court, U.S
FILED
APR 5 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1089

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RACK and BALL CLUB, INC.,

Appellant,

vs.

THE KOREAN PRESBYTERIAN
SOUTH CHURCH OF NEW YORK,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF
THE STATE OF NEW YORK,
APPELLATE TERM, 2nd AND 11th JUDICIAL DISTRICTS

MOTION TO DISMISS

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No. 83-1089

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

RACK and BALL CLUB, INC.,

Appellant,

VS.

THE KOREAN PRESBYTERIAN SOUTH CHURCH OF NEW YORK,

Appellee.

MOTION TO DISMISS THE APPEAL BY THE APPELLANT, RACK AND BALL CLUB, INC.

The Korean Presbyterian South Church of New York, appellee, makes this motion for dismissal of the appeal to The Supreme Court of The United State from the opinion of the Supreme Court of the State of New York, Appellate Term, 2nd and 11th Judicial Districts upon which judgment was entered on June 27, 1983, affirming the judgment of the Civil Court of Queens County dated November 5, 1982, and its opinion upon which its order was entered August 24, 1983, granting appellant's motion for reargument, and upon such reargument, adhering to its original decision, and denying leave to appeal to the Appellate Division, and moves to have this court to uphold

the decision of the Civil Court of Queens County of the State of New York which granted the right of immediate possession to the Appellee herein, and that the tenant appellant herein was divested of any interest in the property purchased by appellee from the City of New York in whom title was vested by reason of In Rem foreclosure for non payment of real estate taxes and water and sewer rent taxes owed to the City of New York.

The tenant-appellant contension that the In Rem foreclosure provisions (Administrative Code of the City of New York, Section D17-1.0 et seq) are unconstitutional in so far as they do not require the personal notice of the proceedings to be given to tenants in possession and cites the case of *Mennonite Board of Missions v. Richard C. Adams* NO. 82-11 decided June 22, 1983, as authority. It is to be noted that the case was on Indiana law and not on the New York State In Rem Law, and attention is directed to the case of *Gerald D. Nelson v. City Of New York* (NO. 30) decided December 10, 1956 (352 US 103) wherein Chief Justice Warren upheld the constitutionality of the New York City In Rem Proceedings. Also the New York Court of Appeals in the case of *Sonmax, Inc. v. City Of New York* (43 NY2d 253) upheld the constitutionality of the IN REM foreclosure proceedings of the City of New York local law NO. 45 of 1976.

The main thrust of the appellant's claim is that as a tenant in possession it did not receive personal notice of the In Rem proceedings against the property for taxes against the property it was occupying and therefore its rights under a lease executed in January 6, 1976 after the commencement of the In Rem proceedings was not cut off by the proceedings. This is without merit because the very lease presented in evidence in the lower court trial where the appellant relies for its claim, by its terms and more particularly paragraph 42: "During the term of this lease Tenant, at Tenants own cost and expense, shall furnish the fuel for the heating system in the demised premises and operate, maintain and repair the said heating system and furnish such heating as may be required by the appropriate

authorities. Landlord shall not be required to furnish any hot water to the demised premises or any part thereof and if any hot water be required by Tenant, the facilities thereof shall be furnished and installed by the Tenant at Tenant's own cost and expense. The Tenant shall also provide and pay for its own water, sewer rent, gas, electricity and all other utilities." clearly indicates that the tenant appellant herein should have known and obtained from the City of New York the tax bills for the water and sewer rent taxes for which it was supplied by the City of New York. The facts showed that appellant never paid any water or sewer rent taxes for the entire time that it was in possession of the premises subject of the In Rem foreclosure and further appellant under Sec. D 17-17.0 of Administrative Code, City of New York could have filed with the New York City Tax authority an In Rem card which would have compelled the City of New York to notify in writing the appellant of any In Rem Proceedings, but the appellant chose not to do so. (See Appendix, *supra*) This action by the appellant cannot be deemed to absolve appellant from knowledge of the likelihood of In Rem foreclosure against the property for non payment of water and sewer rent taxes.

CONCLUSION

The appeal from the decision below affirming the provisions of the Administrative Code of The City of New York for notice by publication only, to the tenants in possession of real property under In Rem foreclosure should be denied, and that there are no new questions presented in this appeal and the appeal herein should be denied in all respects.

Respectfully submitted,

JOHN D. SAKONA
Counsel For Appellee
159-09 Hillside Avenue
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(212) 291-8181

Appendix

§D17-17.0 Administrative Code of the City of New York

§ D17-17.0 In rem cards; mailing notices to other interested persons.— a. The finance adminstrator shall, in addition to the file maintained by him pursuant to section D17-16.0, maintain a file of in rem cards submitted by any person having an interest in real property who is not entitled to have tax bills mailed to him by the finance administrator, including mortgages, lienors, encumbrancers and owners who have filed owner's registration cards designating someone else to receive bills and notices. Each such in rem card shall be signed by the person filing such card or a duly authorized representavie, shall contain a decription of the premises by reference to the section, block and lot numbers on the tax map and shall state the date on which said card was filed, the full name and post office address of the persons filing said card and the nature of the interest said person has in said premises.

b. The finance adminstrator shall mail a notice of foreclosure and any other process required by this title to each perosn who has filed an in rem card whenever the parcels to which such cards refer are included in a list of delinquent taxes filed pursuant to this title. However, failure to receive such notice or process shall not affect the validity of any proceeding brought pursuant to this title. (Added by L. 1975, ch. 823, August 9, eff. Jan. 1, 1976, which repealed former § D17-17.0; amended by L. 1976, ch. 816, July 26.)